In the

Supreme Court of the United States

October Term, 1967

No. [redacted] 67

In re PAUL THEODORE CHERT, Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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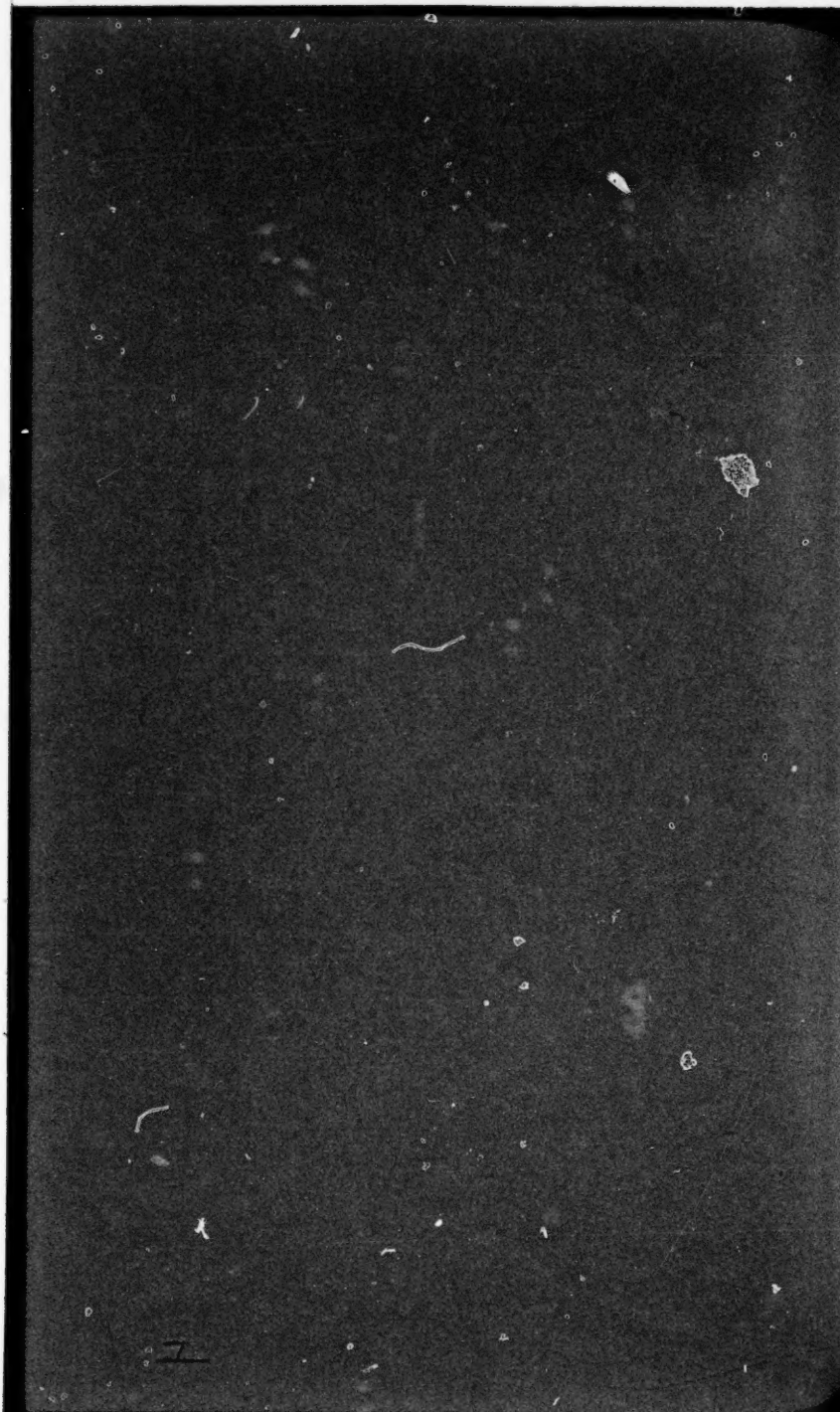

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CITATIONS

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Question 1[1]—Respondents have failed to come to grips with our basic proposition that petitioner's conviction for criminal contempt is in violation of the right of fair warning guaranteed by the Due Process Clause of the Fifth Amendment. They have sought to obscure this important constitutional issue by not even listing it as a question presented for review by this Court, and by treating it as a mere "related claim" to our attack on the sufficiency of the evidence (Br. 2, 9).

The first of two paragraphs obliquely referring to Question 1 (Br. 9-10) begins with a complete misstatement of petitioner's contention. We are said to have claimed the court order did not put petitioner on notice that "failure to

[1] The various matters raised in respondents' brief in opposition (hereinafter referred to as "Br.") will be discussed under the heading of the question presented in the petition for certiorari in No. 1043 (hereinafter referred to as "Pet.") to which they relate. The abbreviations used herein in citing to the record are the same as those used in the petition (Pet. 2 n.l).

correct the practices engaged in by the corporation's salesmen might constitute a violation" (Br. 9). Petitioner has never contended any such thing. Indeed, we have specifically disclaimed any theory "that a prohibitory order places no affirmative duties on corporate officers or that a criminal contempt conviction may not be based upon a failure of such officers to take action designed to prevent violations by subordinates" (Pet. 9).

What petitioner does contend and what respondents have wholly failed to refute is that his conviction was predicated upon a failure to change certain *sales policies* as distinguished from the eight deceptive *sales practices* inhibited by the court order. These *sales policies* relied upon by the court were neither expressly nor impliedly covered by the order and, hence, petitioner's conviction is in violation of the fundamental principle that no man should be held criminally responsible for conduct which he could not understand to be proscribed or required (Pet. 10).

Respondents next state that petitioner had notice that the "factors" (sales policies) relied upon by the court below "'contributed to a condition which lent itself to undisciplined sales practices'" since they were mentioned in the opinion of the FTC hearing examiner issued over a year before the pendente lite order was entered (Br. 10). But the statements in the hearing examiner's initial decision cited by respondents did not become a part of the FTC cease and desist order nor were they incorporated in the court's pendente lite enforcement order. Indeed, at the time the pendente lite order was entered, the Court of Appeals made no findings as to the correctness of either the FTC decision or any opinions or comments expressed in the hearing examiner's initial report. On the contrary, the sole basis for the pendente lite order was the judgment of the court that issuance of such order was "necessary to prevent

injury to the public and to petitioner's competitors. . . ." (Pet. 33). Thus, at the time the court order was entered there had been no judicial determination that the "factors" now relied upon by the court below were contributory to the use of the prohibited practices.

Furthermore, there is not one scintilla of evidence in this record to show that petitioner's failure to make changes in the sales policies relied upon by the court caused a single violation of the order. This essential causative link is supported by nothing but pure assertion.

It is obvious, therefore, that the cited comments in the FTC examiner's initial decision afforded petitioner no notice that his failure to change policies respecting markets, pricing, the basis for compensating salesmen and the structure of Holland's sales organization would subject him to liability for criminal contempt. In any event, as we have previously pointed out, had the FTC or the court considered changes in Holland's policies on these matters essential to effect compliance, provisions requiring such action could have been incorporated in the orders (Pet. 8-9).

We submit that by holding petitioner in criminal contempt for failing to make policy changes neither expressly nor impliedly required by the terms of the order, the court below engaged in an unforeseeable, retroactive, and hence unconstitutional judicial expansion of the narrow terms of the court order under the teaching of *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964) and *Pierce* v. *United States*, 314 U.S. 306, 310-11 (1941), and reached a result squarely in conflict with the Ninth Circuit's decision in *In re Floersheim*, 316 F.2d 423 (9th Cir. 1963).

Question 2—Although the court below declined to make special findings of fact as petitioner had requested (Pet. 6 n. 5), and although no record references are cited in its

opinion, respondents' brief in opposition now claims there is support in the record for at least two of the court's many conclusions. However, the documents and testimony referred to are an inadequate basis for the conclusions singled out and, indeed, provide a further specific illustration corroborating petitioner's position that the evidence in this record is manifestly insufficient to sustain his contempt conviction.

As support for the court's conclusion that petitioner "pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation" (Pet. 23) respondents refer to an alleged admission made by petitioner on cross-examination (Br. 8). It is claimed that petitioner "admitted having taken no other steps in 1959 to obtain compliance than he had taken in 1952, in an earlier purported attempt—which he knew to have been ineffective—to stop the corporation's unlawful practices" (*Ibid.*). Even a cursory glance at the cited pages of transcript show this contention to be totally inaccurate. Petitioner admitted no such thing.

What happened was this: during the course of cross-examining petitioner, prosecution counsel asked the court to take judicial notice of testimony given by petitioner in the antecedent FTC proceeding. Over petitioner's objection, this prior testimony was admitted, not for purposes of impeachment but as "primary evidence," and was then read into the record.[2] It disclosed that in 1952, petitioner wrote to Mr. Richard P. Whiteley, Director of the Bureau of Anti-Deceptive Practices of the Federal

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[2] All matters pertaining to the admission into evidence of petitioner's testimony in the FTC proceeding, including our objections thereto and the arguments of prosecution counsel based upon such testimony, will be found in Env. 11, Tr. Vol. 18, pp. 2068-87.

Trade Commission, and agreed to take steps to prevent the use of certain sales practices by Holland's salesmen. In the FTC proceeding, petitioner was asked what steps had been taken and he stated:

> "A We have a public relations department which employs several men. We have extra men out under the branch controller. We have established a man under—an ex-FBI man, who was hired from the FBI. We have had repeated meetings with division managers and we have issued bulletins or letters on it.
>
> "Q Have you bulletinized your individual salesmen on this?
>
> "A I think not" (Env. 11, Tr. Vol. 18, p. 2080).

Prosecution counsel in this case then argued to the court (petitioner did not admit) that the steps taken in 1959 to obtain compliance were no different than those taken in 1952 (*Id.*, pp. 2085-87).

Until receiving the respondents' brief, we had no way of knowing that petitioner's testimony in the FTC proceeding was being relied upon as a basis for his contempt conviction and, hence, we made no reference to such testimony in our petition for certiorari. However, since this prior testimony is now cited as the principal basis for one of the court's conclusions, we again wish to challenge its admission by judicial notice as we did during the trial (Env. 11, Tr. Vol. 18, pp. 2069-70, 2072, 2083, 2086). Judicial notice was improperly taken of this prior testimony since the rules of evidence in an FTC hearing are entirely different than they are in a criminal contempt proceeding and since petitioner was not even a party to the FTC case. In addition, said testimony was admitted into evidence, not during the prosecution's case in chief nor on rebuttal, but while petitioner was presenting his defense.

But even if judicial notice were properly taken, the above-quoted testimony from the FTC hearings (*supra*, p. 5) (the only evidence in the record concerning what was done in 1952) wholly fails to show that the steps taken in that year were in any way comparable to the compliance program set up following entry of the pendente lite order in 1959. The department referred to in petitioner's prior testimony was denominated "a public relations department." There is no showing that this department was charged with the functions assigned to the Product Service Department, which was specially set up in 1959 to assure compliance with the pendente lite order and which was given the direction and authority to investigate, document and take appropriate disciplinary action in response to sales complaints (see Pet. 7 and record citations). The prior testimony refers to "meetings with division managers" but does not disclose what matters were discussed at such meetings, the frequency of them or the period of time during which such meetings were held. In contrast, the uncontradicted testimony in this record shows that following the entry of the pendente lite order, compliance procedures were discussed at all division managers' meetings, which were held monthly (see Pet. 7-8 and record citations). In the FTC proceeding, petitioner testified that bulletins were sent out but the testimony does not reveal the content of such bulletins, the frequency with which they were sent out or their purpose. The FTC testimony further indicates individual salesmen were not bulletinized. In contrast, following entry of the court order, a number of bulletins were sent periodically to individual salesmen specificially emphasizing compliance with the court order (see Pet. 7 and record citations).

Assuming, *arguendo*, that the steps taken in 1952 and 1959 were comparable, the record still does not support the

conclusion that the 1952 program was inherently deficient and that petitioner knew this. The only evidence in the record is to the contrary and shows that Mr. Whiteley, himself, wrote to Holland in January 1953, complimenting it for

> ". . . making every effort to satisfy the complaints that had been made with respect to certain practices of your employees" (Env. 14, CX 52).

Perhaps of greatest significance is the fact that the court below made no finding nor did respondents refer to any evidence (indeed there is none) that petitioner knew or had any reason to believe that the compliance program set up in 1959 was not bringing about compliance with the court order. On the contrary, the record shows that countless men who violated the court order were either fired or demoted (see Pet. 8 and record citations). It further shows that petitioner was given frequent reports and in fact believed that the steps taken by the company following entry of the court order were effectively bringing it into compliance and preventing violations (Env. 10, Tr. Vol. 16, pp. 1832-38, 1855-57; Env. 13, PX 93; Env. 14, CX 3, 35, 37, 40, 41).

Respondents claim support for the court's conclusion that petitioner complained of recommendations to discharge salesmen suspected of violating the court order, based on a November 2, 1959 "Firepot" article (Env. 13, PX 35) and a letter which petitioner wrote several days earlier (*Id.*, PX 87; Br. 8-9).

That article, however, simply does not support the conclusion. It does not even mention "salesmen" nor is it directed at attempts to fire employees who engage in deceptive sales practices. In fact the article excepts from its scope recommendations to fire employees who engage

in deceptive practices and thereby "jeopardize the welfare of the company" and warns that employees guilty of such practices will be dealt with by "summary action" (Env. 13, PX 35). What it does condemn is the unjustified and indiscriminate firing of company employees simply because someone "dislikes the cut of . . . [their] features" or "doesn't like what . . . [they have] said" or about whom there is "a slight rumor" or for "lack of business' (*Ibid.*). Petitioner specifically testified that the article was written because four or five branch managers had been fired for this last reason—lack of business—and that it had nothing to do with recommendations to fire employees who were thought to have violated the court order (Env. 10, Tr. Vol. 16, pp. 1902-03).

Furthermore, petitioner's letter to company counsel does not support the court's conclusion since it, too, was directed only at unjustified recommendations to " 'fire' everybody" (Env. 13, PX 87). Petitioner carefully pointed out that he was not talking about employees guilty of deliberate wrongdoing or prevarication whom, he stated, "we do not want" (*Ibid.*).

Thus, neither PX 35 nor PX 87 provides a basis for the conclusion that petitioner complained of recommendations to discharge salesmen who had violated the pendente lite order.

A March 1960 issue of the "Firepot" (Env. 13, PX 43) is cited as evidence that " 'salesmen whom [the head of the complaint division] recommended discharging were praised in the [corporation's house organ]' " with petitioner's " 'knowledge and approval' " (Br. 9). The "salesman" mentioned in respondents' brief as having been the subject of a discharge recommendation, one Joseph Mascali, was in fact demoted to a position in which he made substantially less money (Env. 8, Tr. Vol. 2, pp. 256-59). The prosecu-

tion did not prove or even contend that Mascali, after his demotion, did anything even suggestive of being a deceptive sales practice.

The "praise" accorded Mascali consisted of merely listing his name, along with 27 others, on page 12 of this issue of the "Firepot" (PX 43) under the heading "Special Heating Technician Citations."

Most importantly, there is not one scrap of evidence in this record (and respondents could point to none) showing that petitioner either knew of or approved giving such "praise" to this salesman.

Thus, none of the evidence cited in the respondents' brief supports the court's conclusions and this absence of any substantial evidentiary basis further illustrates the need for review on certiorari by this Court.

Question 3—Respondents argue that since the prison sentence imposed upon petitioner is within the punishment limits established by Congress in 18 U.S.C. § 1(3) (Br. 2-3), the issue involved in *Harris* v. *United States, cert. granted,* 379 U.S. 944 (1964) (No. 526) is not present in this case. However, the fact that petitioner's six-month prison sentence does not exceed the maximum period designated by Congress in order for a statutory misdemeanor to be a "petty offense" is not determinative. There is nothing in *United States* v. *Barnett,* 376 U.S. 681 (1964) suggesting that the petty offense punishment limits contained in 18 U.S.C. § 1(3) are applicable to a contempt proceeding. Indeed, the penalty that may be imposed in a non-jury trial criminal contempt case raises an important constitutional question under Article III, § 2, Par. 3, and the Sixth Amendment (Pet. 17) which this Court, not Congress, must decide. Hence, the issue involved in *Harris* is also pre-

sented in this case and, accordingly, certiorari should be granted.

For all of the reasons set forth in the petition and this reply we urge that a writ of certiorari be issued.

Respectfully submitted,

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